IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

PREFERRED RISK MUTUAL
INSURANCE COMPANY
Plaintiff

V. NO. 3:96CV41-B-A

WALTER SPRINGER and
JENNIE M. SPRINGER
Defendants

MEMORANDUM OPINION

This cause comes before the court upon the plaintiff's motion for summary judgment. The court has duly considered the parties' memoranda and exhibits and is ready to rule.

FACTS

The plaintiff, Preferred Risk Mutual Insurance Company (hereinafter "Preferred Risk") has brought this declaratory judgment action to determine its rights and liabilities, if any, under a homeowners insurance policy issued to the defendants, Walter and Jennie Springer. On September 9, 1994, at the insured location, a dog owned by the insureds bit a two-year-old female child named Barbara Jean Warren. At the time of the incident, Mrs. Springer was baby-sitting Barbara Jean Warren and Warren's four-year-old sister. A lawsuit was subsequently filed against the Springers in the Circuit Court of Lee County, Mississippi, by and on behalf of the minor child, Barbara Jean Warren. Preferred Risk is defending said lawsuit under a reservation of rights.

The homeowner's policy issued to the Springers contained a business exclusion which excluded from liability and medical payments coverage any bodily injury arising out of or in connection with a business engaged in by an insured. The policy defined "business" as a "trade, profession, or occupation." The policy further contained an endorsement which specifically stated that the policy did not provide liability coverage for injuries arising out of a home day care business. The endorsement explained that if an insured regularly provides home day care services in exchange for monetary or other compensation, that enterprise would be considered a business. Therefore, any injuries arising out of such service would be excluded from coverage by way of the business exclusion.

At the time of the incident, the Springers had been baby-sitting the Warren children for approximately three weeks. They were compensated at the rate of $32.50 per week, per child, for a total sum of $65.00 per week. Prior to the incident in question, the Springers had not baby-sat for any other children during the life of the Preferred Risk policy. At the time of Mrs. Springer's deposition, the Springers were baby-sitting another child. However, Mrs. Springer testified that they were only baby-sitting this other child temporarily, while one of the child's family members recovered from surgery.

LAW

On a motion for summary judgment, the movant has the initial burden of showing the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 275 (1986) ("the burden on the moving party may be discharged by 'showing'...that there is an absence of evidence to support the non-moving party's case"). Under Rule 56(e) of the Federal Rules of Civil Procedure, the burden shifts to the non-movant to "go beyond the pleadings and by...affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" Celotex Corp., 477 U.S. at 324, 91 L. Ed. 2d at 274. That burden is not discharged by "mere allegations or denials." Fed. R. Civ. P. 56(e). All legitimate factual inferences must be made in favor of the non-movant. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 91 L. Ed. 2d 202, 216 (1986). Rule 56(c) mandates the entry of summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp., 477 U.S. at 322, 91 L. Ed. 2d at 273. Before finding that no genuine issue for trial exists, the court must first be satisfied that no reasonable trier of fact could find for the non-movant. Matsushita Elec. Indus. v. Zenith Radio Corp., 475 U.S. 574, 587, 89 L. Ed. 2d 538, 552 (1986).

The plaintiff asserts that the Springers were regularly providing home day care services in exchange for monetary compensation, and therefore, pursuant to the home day care endorsement and the business exclusion, the injuries to Barbara Jean Warren are excluded from coverage. The defendants argue that they were not "regularly" providing home day care services, in that the services provided to the Warren children were temporary in nature. The defendants further contend that they were not compensated for their services since the entire $65.00 per week was used to pay for meals and snacks for the children. Finally, the defendants assert that at the time they purchased the homeowner's policy, their insurance agent verbally represented to them that they would be covered for any injuries that occurred on their property.

Although the defendants' brief claims that the services provided to the Warren children were of a temporary nature, the defendants have submitted no evidence to support their contention. Each of the defendants filed an affidavit, neither of which states that they were only baby-sitting the Warren children on a temporary basis. Furthermore, while describing the arrangement in her deposition, Mrs. Springer failed to mention that she was only baby-sitting the Warren children for a limited period of time.[1] Mrs.

[1] In explaining the situation regarding the child she was currently baby-sitting at the time of her deposition, Mrs. Springer did mention that it was only a temporary situation.

Springer did testify that she had been asked to baby-sit the Warren children after the incident, which indicates that the Warren family was still needing baby-sitting services, and that the initial arrangement was not expected to be a temporary situation. It is further undisputed that the defendants were compensated at the rate of $65.00 per week for their services. The defendants claim they did not make a profit, as the money was used to purchase meals and snacks for the children. However, the mere fact that the defendants failed to profit from their endeavor does nothing to negate the fact that they were compensated for their services. Therefore, the court finds that Springers were "regularly" providing home day care services for compensation.

The defendants' contention that their agent promised them they would be covered for any injuries that occurred on their property does nothing to alter the court's conclusion. It is well-settled under Mississippi law that an agent's representations cannot modify an insurance policy so as to create coverage or expand existing coverage to a risk that is specifically excluded under the terms of the policy. Mississippi Hosp. & Medical Serv. v. Lumpkin, 229 So. 2d 573, 576 (Miss. 1969); Employers Fire Ins. Co. v. Speed, 133 So. 2d 627, 629 (Miss. 1961).

CONCLUSION

For the foregoing reasons, the court finds that the plaintiff's motion for summary judgment should be granted.

An order will issue accordingly.

THIS, the _____ day of September, 1996.

NEAL B. BIGGERS, JR.
UNITED STATES DISTRICT JUDGE